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Docket No. 07-1340

FILED
JUN 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT of the UNITED STATES

Donald C. Marro

Petitioner

v.

Virginia Electric and Power Co., Inc.

Respondent

On Petition For Writ of Certiorari

from the Supreme Court of Virginia and

Fauquier County (VA) Circuit Court

PETITION FOR REHEARING

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540-253-5309

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Introduction

Notice of denial of the Writ Petition herein was sent by first class mail May 27, 2008. This petition For Rehearing timely followed.

Rule 44(2) requires express grounds for Rehearing. Petitioner relies on "the other substantial grounds" prong, and contends his *pro se* status consistently and wrongly influenced decisions in courts below.

Crying wolf is perilous and carries an obligation of support, discussion of which follows.

Procedural Posture

Disputed is whether Respondent had an easement for its power lines on Petitioner's property. Respondent first claimed recorded easement, then found its recorded easement applied to another property entirely.

Respondent then claimed prescriptive easement but never proved it. Petitioner contended his proofs defeated prescription but Petitioner's contention was never tested.

In total there were 4 suits on this matter, the first in General District Court. That suit was removed by Respondent to the Circuit Court wherein leave to amend the modest (tree-trimming only) trespass damages set when there was hope of compromise was objected to and denied.

The trespass counts were then nonsuited. Remaining negligence counts were dismissed when Respondent raised for the first time at trial an "independent contractor" defense against tree-trimming liability. Petitioner objected, stating that failure to plead this defense precluded it from being

raised at trial, and further, the "dangerous instrumentality" exception applied in any case, but both grounds for objection were denied.

In the first trespass action, the trial court would not permit Petitioner to testify to his own damages or allow his expert to rely on lengthy experience to assess dimunition in value. Although the easement question was unresolved, that suit was ordered dismissed.

Since easement was unsettled and power lines remained, Petitioner brought a second trespass action, asking Declaratory Judgment as to power line placement and damages relief if no easement was found.

Several weeks later, Respondent brought its own Declaratory Judgment action on the very same easement issue.

Petitioner was sanctioned for seeking damages for the continuing trespass that a favorable Declaratory Judgment ruling would have recognized, and any relief to Petitioner was denied as res judicata. Thereafter, both Declaratory Judgment actions were dismissed because Petitioner had sold the property.

Discussion

1. **A case is ripe for review by this Court when adjudicated below not on the weight of facts or persuasiveness of argument but rather on the litigants' status, the *pro se* being disfavored.**

Trial court rulings over the dispute's history show Petitioner disfavored, starting with denying leave to amend trespass damages well before trial, then dismissing negligence counts on "independent contractor" grounds raised for the first time at trial and made infirm in any event by the dangerous instrumentality exception raised thereto.

Thereafter, Petitioner was not permitted to testify to his own property value despite express authority in support of such testimony, and his expert not permitted to rely on lengthy experience for dimunition in value testimony. Petitioner was stigmatized by a "vexatious" characterization that has since had an adverse effect in another, unrelated matter, and sanctioned for asking relief in a Declaratory Judgment action quite the same as Respondent brought.

Petitioner was also faulted for the many discovery motions required of him to pry information from an experienced and recalcitrant Respondent, and sanctioned for a discovery response not unlike those Respondent gave repeatedly, and with impunity

These incidents, and others, amount to an adverse, inhospitable adjudicatory setting.

2. **A case is ripe for review by this Court when a taking is not a taking because a *pro se* is the litigant and the lawyer.**

Coloring the proceedings below were how a major corporation could be mistaken about placement of its power lines and less certain of law than a *pro se*.

We have seen that Respondent's recorded easement was erroneous, and we have seen that Respondent consistently chose not to attempt proof of prescriptive easement.

We have also seen how a recalcitrant Respondent could force multiple discovery motions, then artfully lay blame for such on a demonized, *pro se* plaintiff.

Yet the fact remains that easement was never resolved. Since easement could well be decided in Petitioner's favor, we may equally well be left with a court-sanctioned taking without compensation.

Not because of the weight of the facts was compelling, and not because of the persuasiveness of the arguments, but chiefly because of status.

3. **A case is ripe for review by this Court when trial courts are so overworked and harried that the need for "finality" trumps the need for equity.**

The trial court was determined on "finality", allowing the unauthorized property use at the heart of this easement action to be completely ignored.

The trial court further fixed upon "one damage event" from the trespass, tree damage only, and concluded that damage event was decided. That, however, was not the state of the pleadings.

The trial court also saw Petitioner as adding to its excessive workload, branding Petitioner as "vexatious" for using the court repeatedly (and mostly successfully) to pry discovery from a recalcitrant Respondent.

4. **A case is ripe for review by this Court when the underlying property right is still unresolved and suit under 42 USC 1983 is unattractive.**

Arguably, Petitioner could attempt redress of this matter in an action under 42 USC 1983.

That is decidedly unattractive as Petitioner will stay *pro se* to avoid a Pyrrhic victory, is now branded as vexatious, and can expect that any trial court hearing such an action will be reminded by Respondent of state court decisions and those of this Court as well. Notwithstanding that easement is unsettled and denial of a Petition is not dispositive.

Conclusion

A balanced view requires consideration that the trial court was right, even if for the wrong reasons. Reaching that conclusion appears to be impossible

given that easement was never decided and a favorable ruling on whether there was an easement would entitle Petitioner to compensation for a taking.

We must also consider that this Court is occupied with weighty matters, and may have concluded that a Petition which reached it after the state's highest court declined review on jurisdictional grounds is technically deficient.

To one who gained his experience of the judicial system theoretically and not empirically, the interest of justice rubric appears the more cogent consideration, with the facts and authorities seemingly aligned in support of that conclusion.

For those reasons, the Petition should be granted.

June 19, 2008 by: _____
Donald C. Marro, *pro se*

Certificate of Good Faith

I certify that I have brought this Petition in good faith and not for delay, restricting it to the grounds specified by Rule 44 (2).

June 19, 2008 by: _____
Donald C. Marro, *pro se*

Certificate of Word Count

I certify this Petition for Rehearing complies with word count restrictions.

June 19, 2008 by: _____
Donald C. Marro, *pro se*

Certificate of Service

I certify that this Petition For Rehearing was served this date upon counsel for Respondent.

June 19, 2008 by: _____
Donald C. Marro, *pro se*